85-953

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Ray E. Cagle,
Petitioner,

v.

Mary E. Cagle Carlson, Paul W. Mercer and Florence L. Mercer, and Gertrude Doyel,
Respondents

Writ of Certiorari to the Arizona Court of Appeals, Division One

Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Whether a judgment debtor, whose real property is subjected to a post judgment sheriff's sale at auction, which is intentionally conducted without either he or his counsel having been given any actual notice of the sale, is deprived of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Ray E. Cagle,
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v.

Mary E. Cagle Carlson, Paul W. Mercer and Florence L. Mercer, and Gertrude Doyel,
Respondents

Writ of Certiorari to the Arizona Court of Appeals, Division One

Petitioner Ray E. Cagle, respectfully requests this Court to issue its Writ of Certiorari to review the decision of the Court of Appeals of the State of Arizona, Division One, as to which review was denied by the Supreme Court of the State of Arizona on September 4, 1985.

DECISION BELOW

The decision of the Arizona Court of Appeals, Division One, is reported at ___ Ariz. ___, 705 P.2d 1343 (App. 1985), and is attached as Appendix A. The Order of the Arizona Supreme Court, denying review, attached as Appendix B, is unreported.

STATEMENT OF JURISDICTION

The opinion of the Arizona Court of Appeals was entered January 29, 1985. A timely motion for rehearing was denied, and the Petitioner timely sought discretionary review by the Arizona Supreme Court, which was denied by order entered September 5, 1985. This court has jurisdiction by virtue of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> "[N]or shall any state deprive any person of . . . property without due process of law."

Ariz. Rev. Stat. Ann. §12-1621 A. provides:

> "Notice of Sale under execution shall be made as follows:
>
> . . . .
>
> 3. For the sale of real property, notice shall be given by posting notices for not less than fifteen days successively before the day of sale in three public places in the county, one of which shall be at or near the court house door, and publishing a copy thereof in a newspaper for three weeks before the day of sale."

STATEMENT OF THE CASE

Prior to 1972, petitioner was married to respondent Mary Cagle Carlson. In that year, respondent Carlson retained respondent Mercer, who was then admitted to

practice law in Arizona, and sued petitioner for divorce. A property settlement was agreed upon, and the divorce granted.

Petitioner was in the trucking business, and owned an office and yards suitable for the conduct of that business, in an industrial area of Phoenix, Arizona. As part of the settlement of his divorce action, Petitioner delivered to his former wife a promissory note for $50,000 plus attorneys' fees of $2,500, and secured the obligation by a mortgage on his business premises.

Petitioner experienced perennial difficulties in operating his business, which primarily consisted of trucking cotton farmed in Arizona, and in 1974, he was in default on the obligation to Respondent Mary Cagle Carlson, which had by this time been assigned in whole or in

part to lawyer, Respondent Mercer.[1] After once reinstating, and again defaulting, Petitioner suffered a foreclosure judgment against him on 30 Sept 1974 in the Arizona Superior Court. On 25 November 1974, Petitioner perfected an appeal. He was unaware that Respondent Mercer had instituted proceedings by which the local sheriff would sell his business yard and office, and therefore did not obtain a supersedeas bond.

Respondent Mercer never provided Petitioner with any notice that the sheriff's sale was pending.[2] Petitioner

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[1] The extent of the assignment to Mercer before the mortgage foreclosure action was disputed below, but is irrelevant to this petition. His scheme to acquire the property at a bargain price occurred at and after the foreclosure action which produced the sheriff's sale complained of here.

[2] While the Sheriff conducts the sale, and theoretically gives the notice, the practice in Arizona, as elsewhere, is

was unaware until the middle of January, 1975, that a sheriff's sale had been conducted on November 27, 1974. App. 112.[3]. This meant that he had been unable to redeem the premises prior to the sheriff's sale, as was his legal right under statute.[4] Such pre-sale redemption would have saved expenses of sheriff's sale. It meant that he was unable to

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for the judgment creditor's attorney to prepare all papers and arrange for scheduling and published notice of the sale, as well as to request posting by the sheriff of notices of sale.

[3] References to "App" are to the appendix to the opening brief filed by Petitioner in the Arizona Court of Appeals; which appendix gathers more pertinent portions of the trial court record. This specific reference is to an amended and supplemental complaint, which was verified under oath by Cagle, and thus served as an affidavit for consideration by the trial court in its ruling on the summary judgment motions which disposed of this case. *E.g., Jesik v. Maricopa County Community College Dist.* 125 Ariz 543, 611 P.2d 547 (1980).

[4] Ariz. Rev. Stat. Ann. §33-726.

appear and bid upon the property. It meant that approximately one-third of the time that Petitioner would have had to obtain funds to redeem the premises from the sheriff's sale had also run by the time that Petitioner learned of the sale.[5] Petitioner did not redeem the premises.

Petitioner was ultimately to sue respondents to have the sheriff's sale of his trucking yard declared void, on grounds which included the assertion that failure to provide him actual notice deprived him of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.[6] The ultimate ruling

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[5] Ariz. Rev. Stat. Ann. §12-1282 B. (West 1956).

[6] The procedural history of this case is protracted, given that motions in the nature of demurrers to the pleadings were originally granted, and ultimately reversed on appeal. Most of the procedure

of the Arizona trial and appellate courts rejected the notice and due process issue presented here. In the trial court, summary judgment was granted against petitioner, in proceedings by which respondents both conceded Petitioner's material and sworn allegations of fact, at least for purposes of summary judgment, and chose not to present any controverting affidavits. Thus, as pleaded and presented by affidavits, the following facts were

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is irrelevant to this Petition. However, Petitioner's objection to the failure to give him notice of the Sheriff's sale, and the due process argument premised on the federal constitution, were raised early and often before the trial court. (second amended complaint filed February 4, 1975, App. 4; 1975 opposition to summary judgment, App. 70,71; amended and supplemental complaint, App. 110-112; 1981 response to motion to dismiss, App. 52, 53)

placed before the Arizona courts for a summary judgment ruling:[7]

Respondent Mercer was himself the true party in interest, he having unduly influenced and coerced Respondent Mary Cagle Carlson to sell her interest in the property for $20,000. App. 124, Summary Judgment Motion of Respondent Carlson. Mercer had entered a "credit bid" of $20,000 for the property at the sheriff's sale of November 27, 1974. He induced Respondent Carlson to quitclaim her interest to Respondent Doyel, Mercer's mother, without disclosing that relationship. App. 127, affidavit of Respondent

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[7] In Arizona, as elsewhere, a party against whom summary judgment is contemplated is entitled to have all facts and inferences contained in the record viewed most favorably toward him, and most stringently against the moving party. *E.g. Cooper v. Ariz. Western College Dist. Governing Board*, 125 Ariz. 463, 610 P.2d 465 (1980).

Carlson. This quitclaim was followed by Mercer's mother, Respondent Doyel, quitclaiming her interest in the property to an entity known as L & M Investments, which was owned by Mercer. App. 93, 99. Mercer then obtained possession of the premises, and under the name of L & M Investments, leased the property to new tenants, and began receiving rent. App 95-99.[8]

In Arizona, the only statutory requirement of notice is publication in a newspaper of general circulation, and posting of notices for fifteen days before the sale in three public places, one of which must be the courthouse. Ariz. Rev.

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[8] The scheme by Respondent Mercer was not unlike other manipulations he engaged in, using L & M Investments in some instances, which lead to his disbarment by the Arizona Supreme Court. *In the Matter of Paul W. Mercer*, 133 Ariz. 391, 652 P.2d 130 (1982).

Stat. Ann. §12-1621 3. Mercer actually knew Petitioner Cagle's business and residence addresses; indeed the property to be foreclosed was Cagle's trucking yard. Moreover, these addresses were also reasonably ascertainable to Mercer when he was preparing for the sheriff's sale of the property. Mercer intentionally failed to give Cagle actual notice, and used a newspaper for publication that he knew Cagle was unlikely to read.[9] App. 110, 111; App. 124.[10]

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[9] The publication was in the Arizona Weekly Gazette, a paper which did qualify as one of general circulation, but which is widely known, and would have been judicially noticed by the trial and appellate courts sitting in Phoenix, Arizona, not to be read by the general public.

[10] These provisions of the sworn supplemental complaint were accepted by respondent Carlson for purposes of judgment on the pleadings; they were not disputed by respondent Mercer by the submission of any affidavit, he rather arguing that they did not state a claim, because no notice

The property was sold to Mercer, bidding on behalf of Respondent Mary Cagle Carlson (before he obtained title by the conveyance through his mother as a straw-man) for a $20,000 credit bid. Petitioner, in his complaint to set aside the sale as void, and to recover damages, asserted that the property was worth from $60,000 to $262,500.[11] In his suit, Cagle offered to pay what the court might determine he still owed, but asserted under oath that he had not only paid monies sufficient to satisfy the judgment, but had paid an additional $71,670.36 under compulsion and

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was required to be given. App 131

[11] In his verified complaint, Petitioner asserted that the property was worth $60,000. Tax records showed the trucking yard to have been given a full cash value assessment of $58,697. App 73. Cagle's previous counsel, in an affidavit, asserted that the premises were in an industrial area, carried a value of $0.80 per square foot, or $262,500.00. App 21.

legal process brought about by the execution sale. App. 112.

The trial court granted respondents' motions for judgment on the pleadings and for summary judgment. App. 155-159. The Court of Appeals affirmed. It found that this Court's decision in *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.* 266 U.S. 285 (1924) was applicable, though it dealt with post-judgment garnishment, rather than execution sale. Noting, Appendix A, infra, p. A-17 et seq., that more recent cases from this Court have refined the requirements of due process since the days of *Endicott*, and acknowledging that other states' appellate courts have disagreed on the precise point, the Court of Appeals nonetheless concluded that no due process violation had occurred. It felt that having received notice of the original foreclosure proceeding was enough, because:

> "The entry of judgment placed the appellant and certainly his counsel upon notice that execution could follow. Also, notice by recording was made subsequent to the sheriff's sale, and the appellant still had the statutory redemption period under which to assert his rights." Appendix A, infra at p. A-23,24.

The Court of Appeals did not address itself to the facts that Petitioner did not in fact receive notice; that he experienced added costs even if he was able to redeem; that he lost one third of the redemption period within which to try to arrange for redemption; that he lost the opportunity to try to arrange for other bidders to bid the property at a fair price; and that the authorities cited by Petitioner required not merely constructive notice but the best notice practicable

under the circumstances.[12] Judge Kleinschmidt specially concurred, believing that because "debtors will not always be aware that their property has been executed upon and will thereby lose their right of redemption" Appendix A, infra, at p. A-27, that the issue of notice ought to be reexamined. However, he felt himself bound by an Arizona Supreme Court Case, *Knight v. DeMarcus*, 102 Ariz. 105, 425 P.2d 837 (1967).

Petitioner sought discretionary review from the Arizona Supreme Court, tendering the issue of "Whether due process requires actual notice to a defendant of a sale of execution." Petition for Review, p. 6. That Court declined to exercise its jurisdiction, by

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[12] *E.g. Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The due process issue was briefed by Petitioner at p. 27, appellant's opening brief.

a divided vote, in its order of September 4, 1985. This Petition was thereafter timely filed.

REASONS FOR GRANTING THE WRIT

Both the reasoning by the Arizona Court of Appeals, and the result in this case, directly conflict with a line of due process cases decided by this Court, beginning with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and continuing through *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). The conclusion by the Court of Appeals that *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924) "enjoys continued vitality", Appendix A, infra, p. A-21, and that, therefore, "the entry of judgment placed the Appellant and certainly his counsel upon notice that execution could follow", Id. at p. A-23, squarely contravenes the guarantees of due process

established by the cases of this Court above cited, and others. The opinion below relies upon a doctrine that was held to be outmoded in *Griffin v. Griffin*, 327 U.S. 220 (1946). It contradicts cases from the courts of other states and the United States Courts of Appeal.

In 1924, this Court was first asked to hold that the due process rights of notice and an opportunity to be heard, applied to post-judgment remedies for the collection of a judgment. *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924). That case dealt with post-judgment garnishment, and the Court held that unless a statute required notice, once judgment was entered, a defendant was entitled to no further notice of what would follow to execute against tangible property. 266 U.S. at 288. In 1946, this Court, in *Griffin v.*

Griffin, 327 U.S. 220 (1946) held that post-judgment proceedings to collect arrearages in support payments were invalid because no notice subsequent to the original entry of judgment had been given. The *Griffin* court, acknowledging that *Endicott* had specified that once judgment was entered there was no need for notice "that further proceedings might be taken" said:

> "We find in this no ground for saying that due process does not require further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways which the 1926 decree did not". *Griffin v. Griffin*, 327 U.S. 220, 229 (1946).

Thus, almost forty years ago this Court had concluded that where actions taken subsequent to the rendition of judgment might substantially affect rights in property, the concept that no notice was

required in a post-judgment proceeding was incorrect. It is beyond dispute that an execution sale of petitioner's truckyard and his office, substantially affects his rights. Such a sale determines the value of the property, often at an artificially low price. It starts a redemption time running. It divests him of any interest in the property, subject to rights of redemption if exercised.

The Court below relied in great part for its conclusion that *Endicott-Johnson* remains fundamentally sound, upon the Arizona case, *Knight v. DeMarcus*, 102 Ariz. 105, 4125 P.2d 837 (1967) which had held, on the authority of *Endicott*, that an execution sale, based upon the same statutes and procedures as are here in issue, was valid even though no notice had been given to the judgment debtor whose property was being sold. This Court had

granted certiorari to review the decision of the Arizona Supreme Court in *Knight v. DeMarcus, supra.* *Hanner v. DeMarcus*, 389 U.S. 926 (1967). Indeed, two members of this Court agreed at the time that the *DeMarcus* case was taken in order to consider overruling *Endicott.* *Knight v. DeMarcus*, 390 U.S. 736, 737 (Douglas, J., joined by Brennan, J., dissenting from dismissal of certiorari). Ultimately, *Hanner v. DeMarcus* was dismissed as having been improvidently granted, this Court apparently concluding that the federal question had not been properly and squarely raised. That same question has been and now is squarely raised in this case.

In the meantime, this Court had decided *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) a case that, together with extensive progeny, requires as an element of due process that

a person having an interest in a proceeding be given the best notice practicable under the circumstances. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) applied the principles of *Mullane* and other similar cases to the sale of real estate for delinquent taxes. The form of notice was the central issue of the case, and this Court held that

> "notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely effect the liberty or property interests of *any* party, whether unlettered or well-versed in commercial practice, if its name and address are reasonably ascertainable", *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983).

In this case, such an address was not only

ascertainable but was known to the Respondent.[13] It is exceedingly clear that the result countenanced below cannot stand in the face of *Mullane, supra, Mennonite Board, supra,* and more generally the due process cases of this Court dealing with creditor's remedies.[14] One of the three judges on the Court of Appeals

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[13] Because this case presents a record of the Respondent Mercer intentionally withholding the giving of notice when he in fact knew where to locate Petitioner, this case is not in the penumbral zone of those situations where the identity and location of a party to be served requires "reasonably diligent efforts" as opposed to those cases where the identity of the person to be served was either known or "easily ascertainable", an issue which divided the Court in *Mennonite Board, supra.* In this case, under either standard, notice could and should have been given, if *Mullane v. Central Hanover, supra,* and *Mennonite Board, supra,* were to be complied with.

[14] *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W. T. Grant*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

panel which decided this case acknowledged that his vote was controlled by *Knight v. DeMarcus, supra,* the Arizona case following *Endicott, supra,* but said "the issue deserves re-examination. Debtors will not always be aware that their property has been executed upon and will thereby lose the right of redemption", Appendix A, infra, at p. A-27 (Kleinschmidt, J., specially concurring).

The result in this case squarely conflicts with *Luskey v. Steffron*, 461 Pa. 305, 336 A.2d 298 (1975), *cert. denied*, 430 U.S. 968 (1977). There, notice of an execution sale of property was posted on the land to be sold, and was published. Inasmuch as notice included posting on the property, it was a better notice than is involved in this case. Citing *Mullane v. Central Hanover & Trust Co., supra,* the Pennsylvania court concluded that the

notice was insufficient and property had been sold in contravention of the due process rights of the owner.

It is not just the court below and *Luskey, supra,* which are in conflict on whether notice must be given before post-judgment remedies, such as execution or garnishment, can go forward. Many state and federal courts are in disagreement on the issue. Among the cases finding no due process violation, *see Brown v. Liberty Loan Corp.*, 539 F.2d 1355 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977); *Chonowski v. Bonucci*, 47 Ill.2d 510, 267 N.E.2d 671 (1971); *Langford v. Tennessee*, 356 F.Supp. 1163 (W.D.Tenn. 1973); *Jahn v. Regan*, 584 F.Supp. 399 (E.D.Mich. 1984). Cases aligned with *Luskey v. Steffron, supra,* finding due process violations, include *Finberg v. Sullivan*, 634 F.2d 50 (3rd Cir. 1980); *Dionne v. Bouley*, 583

F.Supp. 307 (Dist. R.I. 1984); and *Betts v. Tom*, 431 F.Supp. 1369 (D. Ha. 1977).

Indeed, Arizona's own garnishment statutes have been held unconstitutional in post judgment proceedings, for lack of proper notice, in *Neeley v. Century Finance Co. of Arizona*, 606 F.Supp. 1453 (D. Ariz. 1985). Thus in Arizona, the conflict on what process is due in connection with post judgment remedies is particularly sharp. If a litigant is involved with garnishment, due process has been held to require the giving of notice. If execution sale is involved, sales without actual notice are allowed.

The opinion in this case departs from both sides of this issue, however, in that most courts having considered this issue no longer believe *Endicott* contains the correct analysis. *See, e.g., Brown v.*

Liberty Loan Corp., supra, Finberg v. Sullivan, supra.

Much of the above-cited authority which finds no due process violation, relates to garnishment proceedings in which an opportunity for a prompt hearing on Motions to Quash, or other proceedings to challenge the correctness of a garnishment, are available. In this case, while it is true that, as the Court of Appeals noted, there is a right of redemption, there is no automatic judicial procedure at which deficiencies in the sale can be pointed out, or an artificially low price can be remedied, or the judgment debtor can obtain other bidders to try and bid up the price. Indeed, when notice of an execution sale is, as here, intentionally withheld, or is ineffective, a redemption period may very easily run before the

debtor realizes what has happened to him.[15] While it is true that in this case a motion to set aside the sale was brought before the redemption time had run, by the time Petition was aware that the sale had occurred, he had lost approximately 1/3 of the time available to him in which to arrange for redemption, and was not, in fact, able to redeem the property.

CONCLUSION

The need for appropriate notice of post-judgment remedies is an issue that has matured, has divided the courts, and is ripe for decision. Arizona's position, depending as it does upon *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266

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[15] In *Hanner v. DeMarcus*, 390 U.S. 736 (1968), discussed text supra, in which the court had granted certiorari to reconsider *Endicott*, the judgment debtor was relegated to a quiet title action because she did not discover the sale until after the redemption period had run.

U.S. 285 (1924) is constitutionally infirm. The issue is fundamental to the integrity of the judicial process for litigation and enforcement of claims.

For these reasons, it is respectfully requested that this Court grant the Writ of Certiorari.

Respectfully submitted,

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December 2, 1985

APPENDIX A

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

RAY E. CAGLE, Plaintiff-Appellant, vs. MARY E. CAGLE CARLSON, dealing with her sole and separate property; PAUL W. MERCER and FLORENCE L. MERCER, individually and as husband and wife; GERTRUDE DOYEL, widow, Defendants-Appellees.	1 CA-CIV 6781 DEPARTMENT B O P I N I O N

Appeal from the Superior Court of

Maricopa County

Cause No. C-305893

The Honorable David J. Perry, Judge

AFFIRMED

GREER, Judge

This is an appeal from a suit to set aside a sheriff's sale ordered as a result of foreclosure proceedings upon the appellant Cagle's default on a promissory note.

In August 1972, the appellant gave a note of $50,000 to his wife Mary Cagle (appellee Cagle Carlson). She thereafter assigned $15,000 of the note to her attorney Paul Mercer. Cagle subsequently defaulted on the note, and both Mercer and Cagle Carlson then brought foreclosure actions in March 1973 against the properties secured by the note. Mary Cagle was granted summary judgment in her suit and Ray Cagle was granted summary judgment in the Mercer action. Mary Cagle then proceeded to execute on the judgment in her suit, and Mercer, using a credit bid of $20,000, purchased the real property on

Mary's behalf. In January, 1975, the appellant brought the present action to set aside the December, 1974 sale.

On November 10, 1975, the trial court granted a motion to dismiss filed by the defendants (appellees in the present suit). Appeal was taken, and this court issued a memorandum decision in January 1980. Cagle v. Cagle, 1 CA-CIV 4135 Memorandum Decision (Ariz. App. Jan. 15, 1980). We held that the motion to dismiss should be reversed, since the trial court had improperly refused to deal with the issues raised. Specifically, we found that the trial court erred in ruling that the issues raised in the original complaint had been previously tried in another suit.

The matter was remanded and on July 29, 1980, the defendants filed a new motion for summary judgment on the issues of unclean hands, waiver and tender. This

motion was denied October 1, 1980. On October 2, the defendants filed a motion for dismissal claiming the plaintiffs had failed to join an indispensable party. This motion was also denied.

An amended complaint was filed on August 6, 1981, adding the claimed indispensable party, and offering to pay to the defendants the amount of the underlying judgment. On December 9, 1981, defendant Mary Cagle Carlson filed a motion for summary judgment, and on December 14, defendants Mercer and Doyel (the claimed indispensable party) did the same. In January, 1982, the court sought additional memoranda on the issue of tender. Judgments were subsequently entered for the defendants on April 26, 1982, from which the present appeal is taken.

The primary issue raised by the appellant is that the trial court was

precluded from finding there were no material issues of fact in the case by virtue of this court's memorandum decision. They argue that under a "law of the case" or "res judicata" theory, the memorandum decision was a mandate requiring the case to be heard on the merits. We disagree.

In the case of In Re Monaghan's Estate, 71 Ariz. 334, 227 P.2d 227 (1951), our supreme court addressed the effect a prior appellate decision has on subsequent determinations in the same case. The court found two exceptions to the "law of the case" rule, stating, "[W]here the court expressly reserves its decision on any point raised in the first appeal it is not conclusive as to those matters reserved . . . . Nor is it conclusive on points where the first decision is ambiguous and conflicting." 71 Ariz. at 336 (citations omitted). In the present case, although

our first decision stated, "[I]t appears that Mr. Cagle may have stated a cause of action." Slip op. at 5, we expressly reserved determination on the substantive issues, stating, "We wish to make it abundantly clear that our decision is not an adjudication of the merits of this case. Rather, this case is remanded for the litigants and court to deal with the notice, conscionability and other matters claimed as error relating to the sheriff sale."[1] Slip op. at 5-6. In our opinion, the issues subsequently addressed by the trial court (and now this court) were not precluded by our previous memorandum decision.

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[1] Appellant mentions the conscionability and irregularities of sale issues at various points in his brief. The brief, however, does not contain argument or citation in support of either claim. Hence, those issues are deemed abandoned. Valley Vendors Corp. v. City of Phoenix, 126 Ariz. 491, 616 P.2d 951 (App. 1980).

Cases cited by appellant are distinguishable from the case at bar. In Tucson Gas and Electric Co. v. Superior Court, 9 Ariz. App. 210, 450 P.2d 722 (1969), for example, division two of this court dealt with specific errors that arose at trial, and found its earlier decision to implicitly require a "retrial." Appellant also cites Hurst v. Hurst, 1 Ariz. App. 603, 405 P.2d 913 (1965). That decision, however, deals with waiver by failure to object at trial, and we do not find the case in point.

We hold, therefore, that the issues before the trial court had not been previously determined when it entered summary judgment for the defendants.

Turning to the merits of the case, the appellees argue that the grant of summary judgment was appropriate, and cite several grounds to support the judgment.

They assert that the entry is proper since tender of the amount of judgment was not made. Since we find the tender issue dispositive, we will not discuss other contentions made by appellees.

The appellee argues that summary judgment was properly granted since the plaintiff did not tender the amount of judgment prior to moving to set aside the sheriff's sale. In Young Mines Co. v. Sevringhaus, 38 Ariz. 160, 298 P. 628 (1931), our supreme court held:

> This is an equitable proceeding for the foreclosure of a mortgage, and in passing on the motion the general rules of equity should apply. Prominent among these rules is the familiar one that he who seeks equity must do equity. It is not disputed that defendant is both legally and morally indebted to plaintiff for the amount of the judgment for which the property was sold. It is but equitable and the rule sustained by the weight of authority that, as a condi-

> tion precedent to the setting aside of the sale, defendant should tender to plaintiff the amount of the judgment with costs and interest.

38 Ariz. at 166, 167 (citations omitted). Accord, Bracken v. Kyle, Inc., 589 S.W.2d 501 (Tex. App. 1979; Pachter v. Woodman, 534 S.W. 2d 940 (Tex. App. 1976), rev'd on other grounds, 547 S.W.2d 954 (1977).

Appellants' responses to the tender issue are that principles of res judicata, or more properly, claim preclusion, bar this issue; that an offer to make payment suffices as a tender; and that in any event payment of the judgment was made in full.

We first address appellants' contention that prior denial of a motion for summary judgment constitutes res judicata when a new motion for summary judgment is made, based on the same grounds. In Mozes v. Daru, 4 Ariz. App.

385, 420 P.2d 957 (1966), division two of this court discussed the practice of renewing a motion for summary judgment after such a motion had been denied. The court characterized such a practice as an abuse of the system, and stated that repeated motions for summary judgment would not be allowed. The court also noted, however, that no purpose would be served by forcing a case to trial where no genuine issue of fact exists. Further, the court stated, "Hence, there is no iron clad rule that a denial of such a motion is res judicata and absolutely precludes renewal or the making of a subsequent motion for the same relief." 4 Ariz. App. at 389. Here, further discovery was undertaken between the time of the denial of the July, 1980 motion for summary judgment and the December 1981 filing of the new motion. Therefore, even though successive motions

were filed, we find no abuse of the system in the present case.

We also note that "tender" involves more than merely an offer to pay the amount of the judgment. The appellant argues, relying upon our decision in Nelson v. Cannon, 126 Ariz. 381, 616 P.2d 56 (App. 1980), that his statement in the 1981 amended complaint offering to pay "any and all sums which may be, or found by the court to be due and payable under or upon said promissory note and mortgage securing same" is sufficient to overcome the lack of tender at the time of the original complaint. Beyond the fact that the offer came over six years after institution of the action, we find that the statement does not constitute "tender" of the amount of judgment.

In Nelson, we noted that, as a condition precedent to entitlement to the

remedy of specific performance, a buyer must show that he "stood ready, willing and able to perform." 126 Ariz. at 385. That case, however, dealing with specific performance, does not render any less valid the decision in Young Mines Co. v. Sevringhaus. Furthermore, our supreme court, in an early decision, found "tender" to be more than merely the offer to pay. In Somerton State Bank v. Maxey, 22 Ariz. 365, 197 P. 892 (1921), the court held:

> [Tender] imports, not merely the readiness and the ability to pay or perform at the time and place mentioned in the contract, but also the actual production of the thing to be paid and delivered over, and an offer of it to the person to whom the tender is to be made; and the act of tender must be such that it needs only acceptance by the one to whom it is made to complete the transaction.

22 Ariz. at 369. (citations omitted). Accord, Bembridge v. Miller, 235 Or. 396,

385 P.2d 172 (1963). In the present case, we hold that appellant's offer in the amended complaint to pay the amount of judgment did not satisfy the requirement of "tender" to the appellees as a condition precedent to setting aside the sale.

Finally, regarding appellant's argument that he has already "tendered" sufficient amounts over to the appellees, we find that the amounts claimed were paid on other obligations owed by appellant, and are not "tender" or payment in the present suit.

Appellants next contend that they received no personal notice of the sheriff's foreclosure sale; that statutory notice by publication, posting and recording after the sale does not provide due process notice. We disagree.

Although a review of the record discloses that the issue has not been clearly addressed throughout the proceedings, it is apparent that both sides concede compliance with statutory requirements. Appellants, however, assert that due process considerations require notification beyond that imposed by statute.

The requirements of notice pursuant to a sheriff's sale are set forth in A.R.S. § 12-1621. That statute states, in part:

> For the sale of real property, notice shall be given by posting notices for not less than fifteen days successively before the day of sale and three public places in the county, one of which shall be at or near the courthouse door, and publishing a copy thereof in a newspaper for three weeks before the day of sale.

A.R.S. § 12-1621(A)(3). In addition, A.R.S.§ 12-1626 states:

> B. . . . In all other cases [not involving certain specified leaseholds],

> including sales under order of court in foreclosure suits, the property is subject to redemption.
>
> C. The officer shall give to the purchaser a certificate of sale, setting forth a full description of the real property sold, the price bid and paid for each parcel if sold in lots or parcels and whether subject to redemption or not.
>
> D. A duplicate of the certificate shall be recorded by the officer in the office of the county recorder.

As early as 1924, the United States Supreme Court held that a post-judgment debtor was not required to receive personal notice in a subsequent execution proceeding. In Endicott-Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285, 45 S.Ct. 61, 69 L.Ed. 288 (1924), a case dealing with post-judgment garnishment, the Court held:

> "[I]n the absence of a statutory requirement, it is not essential that he be

> given notice before the issuance of an execution against his tangible property; after the rendition of the judgment he must take 'notice of what will follow,' no further notice being 'necessary to advance justice.'"

266 U.S. at 288 (citations omitted).

Admittedly, this decision has since come under attack. In Griffin v. Griffin, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635 (1946), the Court held that a husband against whom a judgment for support arrearages was sought to be enforced required notice so as to not cut off the husband's defenses to the arrearages proceedings. Notably, however, the Griffin holding concerned an enforcement proceeding based upon a judgment obtained in an ex parte proceeding. The Court distinguished between enforcement of such a judgment and enforcement of a judgment rendered upon notice and an opportunity for

hearing. See Griffin, 327 U.S. at 233. In that sense, the Griffin and Endicott-Johnson decisions do not conflict.

More importantly, in the 1950's, the entire due process analysis began to evolve toward a more flexible analysis. In Mullane v. Central Hanover Bank and Truck Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), a case involving a judicial proceeding for approval of an account submitted by the trustee of a common trust, the Supreme Court held that due process required individual notice to beneficiaries whose names and addresses were known to the trustee. Mullane and its progeny, e.g., Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956); Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), have come to stand for the broad proposition that when an adjudi-

catory proceeding is initiated in which the complaining party might directly and adversely have a legally protected interest effected, he is entitled to a hearing. This doctrine had gained wide acceptance in the courts of a variety of states, including Arizona. See, e.g., Laz v. Southwestern Land Co., 97 Ariz. 69, 397 P.2d 52 (1964); Mason v. Wilson, 116 Ariz. 255, 568 P.2d 1153 (app. 1977), Brandt v. City of Yuma, 124 Ariz. 29, 601 P.2d 1065 (App. 1979)

Further, the United States Supreme Court, in 1969, issued the first in a line of decisions affording additional due process rights to pre-judgment debtors. See Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct.

1895, 40 L.Ed.2d 406 (1974); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

Against this backdrop, the more recent cases dealing with the due process rights of post-judgment debtors have produced mixed decisions. In Chonowski v. Bonucci, 47 Ill.2d 510, 267 N.E.2d 671 (1971), the Illinois Supreme Court, in deciding a claim brought by a judgment creditor to set aside an execution sale because of a lack of due process, held that actual notice was not necessary. The court stated:

> Assuming that the appellants lacked proper notice in advance of the sale, however, we are unable to see in what manner this prejudiced their rights. It must be stressed at the outset that the only rights of the appellants in question here are their rights as judgment creditors to redeem the property. As judgment creditors they

> enjoyed no privilege to purchase the property at the execution sale beyond that of any other potential purchaser. As far as [their] rights as judgment creditors are concerned, the sale did not involve an adjudication of them, nor did it extinguish them.

267 N.E.2d at 675. In Langford v. Tennessee, 356 F.Supp. 1163 (W.D. Tenn. 1973), the court relied upon Endicott-Johnson, ruling that as a judgment debtor upon whose automobile had been levied was not entitled to personal notice of the execution proceeding. To the contrary, the Pennsylvania Supreme Court in Luskey v. Steffron, 461 Pa. 305, 336 A.2d 298 (1975), cert. denied, 430 U.S. 968, 52 L.Ed.2d 360, 97 S.Ct. 1651 (1977) specifically held that the owner of real estate subject to a sheriff's sale was required to receive personal notice of the sale.

In decisions dealing with post-judgment garnishment, the results likewise vary. In Jahn v. Regan, 584 F.Supp. 399 (E.D. Mich. 1984), and Brown v. Liberty Loan Corp., 539 F.2d 1355 (5th Cir. 1976), cert. denied, 430 U.S. 949, 51 L.Ed.2d 797, 97 S.Ct. 1588 (1977), federal courts found that state post-judgment garnishment proceedings did not require personal notice to the debtors. Other federal courts, however, have found similar statutes unconstitutional because they did not afford personal notice to the debtor. Dionne v. Bouley, 583 F.Supp. 307 (R.I. 1984); Betts v. Tom, 431 F.Supp. 1369 (D. Hawaii 1977).

In Arizona, the rule of Endicott-Johnson enjoys continued vitality. In Knight v. DeMarcus, 102 Ariz. 105, 425 P.2d 837 (1967), cert. denied 390 U.S. 736, 20 L.Ed.2d 270, 88 S.Ct. 1437 (1968), for

example, our supreme court held that a debtor was not entitled to actual notice when an appointed master sought to execute on real property to satisfy an award of compensation. The case was based upon Rule 53(a) of the Rules of Civil Procedure, and did not discuss the constitutional implications involved. Notably, the United States Supreme Court denied certiorari in the case despite a dissent by Justice Douglas, and joined by two others, in which a stinging criticism of the Endicott-Johnson doctrine was set forth.

More recently, in Huggins v. Deinhard, 134 Ariz. 98, 654 P.2d 32 (1982), this court held that a husband against whom a judgment had been taken for child support was not entitled to actual notice before a writ of garnishment was issued. The opinion briefly noted the developments in the due process analysis after Endicott-

Johnson, but found nevertheless that appellant had had an adequate opportunity to be heard. We stated, "We know of no authority holding that, after judgment, due process of law requires that additional opportunities for notice and hearing must be offered the judgment debtor, such as appellant, before a writ of garnishment may be issued." 134 Ariz. at 103.

We find that the Endicott-Johnson rationale remains fundamentally sound. In the present case, the appellant concedes that statutory notice procedures were complied with. Furthermore, the appellant received personal notice of the original foreclosure proceeding, was represented by counsel and appeared therein several times. The entry of judgment placed the appellant and certainly his counsel upon notice that execution could follow. Also, notice by recording was made subsequent to the

sheriff's sale, and the appellant still had the statutory redemption period under which to assert his rights.

It should be noted also that the situation at present is distinguishable from post-judgment garnishment cases in that exemption defenses are an important right in garnishment proceedings; whereas in a foreclosure case, the possibility of execution upon the property is established at the original proceeding.

We also find the post-Mullane Arizona decisions distinguishable from the case at bar. In Laz v. Southwestern Land Co., 97 Ariz. 69, 397 P.2d 52 (1964), the appellant never received actual notice of any proceeding until after the redemption period. In Mason v. Wilson, 116 Ariz. 255, 568 P.2d 1153 (App. 1977), the appellants were not a party to the underlying foreclosure and therefore had no

notice whatsoever of the judgment. Finally, in Brandt v. City of Yuma, 124 Ariz. 29, 601 P.2d 1065 (App. 1979), the City's challenge was not to an execution sale, but to an application for a treasurer's deed, which occurred subsequent to the redemption period.

We find that the appellant was not denied due process by his lack of actual personal notice to the execution on the property.

Finally, the appellant argues that the grant of summary judgment denied him his right to trial by jury under the United States and Arizona Constitutions. We find this claim to be without merit. In Morrell v. St. Luke's Medical Center, 27 Ariz. App. 486, 556 P.2d 334 (1976), we addressed this precise question and held:

> Finally, appellant argues that the entry of summary judgment precludes

> his right to a jury trial and to cross-examine witnesses. No authority is presented by the appellant, however, to in effect hold that Rule 56, Rules of Civil Procedure, 16 A.R.S., is unconstitutional.
>
> It is obvious that the entry of summary judgment will preclude a later trial by jury. This is the design of Rule 56 - to resolve whether material issues of fact exist, and if none do, then to enter judgment for the moving party if he is entitled to it as a matter of law.

27 Ariz. App. at 490 (citations omitted). In short, the granting of summary judgment does not deprive a plaintiff of his constitutional rights to a jury trial because, in such cases, there are simply no genuine issues of fact for a jury to consider.

In conclusion, we find no due process violation in the notice afforded appellant, and hold furthermore, that

appellant's failure to tender to the appellees the amount of judgment precluded the appellants' setting aside of the sale. Thus, the trial court correctly entered summary judgment for the appellees.

Accordingly, the judgment is affirmed.

D. L. GREER, Judge

FROEB, J., concurs.

KLEINSCHMIDT, Judge, special concurrence:

I concur that notice of execution on the judgment was unnecessary because I think *Knight v. DeMarcus,* 102 Ariz. 105, 425 P.2d 837 (1967) controls. The issue deserves re-examination . Debtors will not always be aware that their property has been executed upon and will thereby lose the right of redemption. *See Luskey v. Steffron, Inc.,* 461 pa. 305, 336 A.2d 298 (1975) *cert. denied,* 430 U.S. 968, 97

S.Ct. 1651, 52 L.Ed.2d 360 (1977) for a case at odds with *Knight*. I think the rule adopted in *Luskey* ensures a fairer result and places little added burden on the judgment creditor.

APPENDIX B

SUPREME COURT

STATE OF ARIZONA

September 5, 1985

Re: RAY E. CAGLE vs. MARY E. CAGLE CARLSON, et al
Supreme Court No. 18163-PR
Court of Appeals No. 1 CA-CIV 6781
Maricopa County No. C-305893

GREETINGS:

The following action was taken by the Supreme court of the State of Arizona on September 4, 1985, in regard to the above-referenced cause:

"ORDERED: Petition for Review = DENIED.

Justice Feldman voting to grant."

Record returned to the Court of Appeals, Division One, this 5th day of September, 1985.

DIANA K. BENTLEY, Acting Clerk

Supreme Court, U.S.
FILED
APR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-953

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Ray E. Cagle,
Petitioner

v.

Mary E. Cagle Carlson, Paul W. Mercer and Florence L. Mercer, and Gertrude Doyel,
Respondents

Writ of Certiorari to the
Arizona Court of Appeals, Division One

Brief for Respondents

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Respondents

QUESTION PRESENTED FOR REVIEW

Whether the Constitutional issue raised by judgment debtor/Petitioner has been rendered moot due to the failure of judgment debtor/ Petitioner to perform a condition precedent necessary to bringing his cause of action before the lower Court.

Whether a Sheriff's sale conducted in accordance with the statutory requirements of ARS § 12-1621 A 3 satifies the requirements of the Fourteenth Amendment of the United States Constitution.

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No. 85-953

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October Term, 1985

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v.

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Writ of Certiorari to the
Arizona Court of Appeals, Division One

Respondents undersigned respectfully request that Petitioner's request for a Writ of Certiorari be denied.

STATEMENT OF THE CASE

Respondents generally agree with Petitioner's Statement of the Case with the exception that some facts set forth by Petitioner were not undisputed facts as Petitioner would lead this Court to believe. For example at page 5 Petitioner states that he was unaware that Respondent Mercer had instituted proceedings by which the local sheriff would sell his business yard and office. Petitioner was represented during this whole by counsel. At page 9 " Respondent Mercer was himself the true party in interest, he having unduly enfluenced and coersed respondent Mary Cagle Carlson to sell her interest in the property for $20,000. These facts were not within the knowledge of Petitioner and other then for the limited purpose of the motion for summary judgment were totally disputed.

There are many other misstatement of facts but Respondents didn't find it necessary to refute them in the lower court as it was not necessary to the determination of the case and is not materal for the purposes of this matter.

REASONS FOR DENYING THE WRIT

Respondent's failure to tender payment of all sums due as a condition precedent renders the constitutional argment moot. Respondents' motion for summary judgment was granted in part because of the aforementioned failure to tender all sums due respondents.

In Young Mines Co. v. Sevringhaus, 38 Ariz. 160, 298 P 628 (1931), the Court said, **** as a condition precedent to the setting aside of the sale, defendant should tender to Plaintiff the amount of the judgment with cost and interest***. 298 P at 630.

Also in Arnold's Management Corporation et al., v. Eischen, et al., 158 Cal. App.. 3d 575 (1984 The Court said, " It is settled that an action to set aside a trustee's sale for irregularitie in sale notice or procedure should be accompani by an offer to pay the full amount of the debt for which the property was secured. *** We conclude, ****, that a junior lienor must allege tender of the senior obligation as an essential element of any causes of action ****."

The Constitutional due process argument also must fail.

Petitioner admits that respondents properly followed the statutory provisions in effectualting the sale of Petitioner's property and admits that even after knowledge of the sale, he failed to redeem the property or take any other action to protect the property for a period of four months. He failed to redeem the property and after the redemption period had run a Sheriff's deed was issued to Respondent Doyel.

These admitted facts by the Petitioner

alone are sufficient to deny his petition for Writ of Certiorari, however, in response to Petitioner's position, Respondents would point out that there is a clear distinction from the holdings in the Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 and the line of cases associated with it and this case. The general theme is that the subjects had their day in court for what ever reason and the proceedings had affected their property rights without proper notice to them. This did not meet the equitable test of balancing the rights of the debtor and the rights of the creditor. The Neeley v. Century Finance Co. of Arizona, 606 F. Supp. 1453, (D Ariz. 1985) cited by Petitioner held that this balancing test was unbalanced as to the judgment debtor and therefore Arizona's garnishment statutes ded indeed violate the due process clause of the 14th Amendment, however this Court went on to say that Endicott (supra) was still viable and the law especially, it would appear, where as here the Petitioner was

represented by counsel before and after judgment, his counsel filed a cause of action months before the redemption period expired and eledted not to redeem his property.

CONCLUSION

Tender is the pivotal word, Petitioner had every opportunity befor and after the foreclosure of his property to tender sums due, he elected not to--- He still hasn't !

The equitable balancing as set forth in the forgoing cases require a denial of Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

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April 2, 1986

Supreme Court, U.S.
FILED
APR 12 1986
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CLERK

NO. 85-953

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Ray E. Cagle,

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v.

Mary E. Cagle Carlson, Paul W. Mercer and Florence L. Mercer, and Gertrude Doyel,

Respondents.

Writ of Certiorari to the Arizona Court of Appeals, Division One

Petitioner's Reply Brief

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NO. 85-953

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The Court below recognized, as the Respondent does not, that the due process issue must be faced; and that a decision on the tender issue did not obviate the need to reach the federal question. Respondent does not acknowledge that the state ground of

decision -- the tender issue -- applied to Petitioner's contentions below that the judicial sale was, in various respects, voidable. In *Young Mines Co. Ltd. v. Sevringhaus*, 38 Ariz. 160, 298 P. 628 (1931), relied upon by the Court below and by the Respondent here on the tender issue, the Arizona Supreme Court applied its tender rule to a case raising issues of voidability -- whether statutory procedures for conducting a sale were complied with.*

After discussing the tender issue, the Court below said (p. A-13, Petition for Certiorari), "Appellants next contend that they received no personal notice of the sheriff's foreclosure sale; that statutory

---

* Indeed, two of the issues dealt with in *Young Mines* -- whether a sale price was adequate and whether sale in parcels should have been ordered -- were raised below in this case. (See Opening Brief, below, p. 6.) It was these parts of the case that the Court below resolved with the "tender" issue.

[procedures do] not provide due process notice." The opinion below then devotes eleven pages to a discussion of the due process issue.

Without saying so in so many words, the Court below recognized that if this sale was void, the tender rule would not completely dispose of this case. And, of course, where notice is lacking so that jurisdiction does not exist, a judgment or a proceeding *is* void. *E.g. Milliken v. Meyer*, 311 U.S. 457 (1940); *Cockerham v. Zikratch*, 127 Ariz. 230, 619 P.2d 739 (1980).

Thus, Respondent's implication that the decision below rests on an adequate and independent state ground is incorrect. This is a case in which the decision below "fairly appears to rest primarily on federal law," and "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," *Michigan v. Long*,

463 U.S. 1032 (1983). Nor does the opinion "clearly and expressly" indicate that it is alternatively based on bona fide, separate, adequate, and independent grounds. *Caldwell v. Mississippi*, ___ U.S. ___, 105 S. Ct. 2633 (1985). Indeed, the Court below could not have so indicated. For if Petitioner is right on the due process issue, and proper notice was not given, then the sale by the sheriff was void, and nothing more would have to be proven. The Court below recognized that it could not stop at deciding the tender issue. It realized that it must reach the due process issue, and it did so. This Court, therefore, has jurisdiction and should exercise it in this case.

Respectfully submitted,

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April 11, 1986